Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In Re:

Review of the Commission's Regulations Governing Programming Practices of Broadcast Television Network and Affiliates

MM Docket No. 95-92

Reply Comments of the Association of Independent Television Stations, Inc.

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I. INTRODUCTION

In our initial Comments, INTV urged the Commission to retain its network affiliate rules. The right to reject rule, the time option rule and the network exclusivity rule are absolutely essential to preserve local programming control by local television stations across the United States.

Also, we supported modifying the network territorial exclusivity rule – to increase the geographic zone of the rule to a station's DMA. We noted, however, that the Commission should retain the first prong of the network territorial exclusivity rule. Preserving this part of the rule ensures that consumers in all markets will have access to network programs. Finally, the Commission should defer action on repealing the dual network rule.

Save for the filings of ABC, CBS and NBC, every comment filed by local television stations in this proceeding supports retention of the right to reject, the time option rule and the exclusive affiliation rule. In other words, local television stations, which are in the business of negotiating with networks day in and day out, believe these rules are essential to preserving the right to select programming that best meets the needs and interests of their communities.

II. THE NETWORKS CONTINUE TO DOMINATE THE NETWORK AFFILIATE RELATIONSHIP.

A. Elimination of the Radio Affiliate Rules Provides No Precedent for Eliminating the Television Affiliate Rules.

In 1977, the FCC eliminated the network affiliate rules as they applied to the radio industry. Despite the networks' attempts to draw comparisons, today's television marketplace is fundamentally different from the radio market that existed in 1977.

First, in 1977 there were ten "conventional" radio networks not to mention five other networks such as newswire services.[1] Today there are only three established networks; one network which only recently has become competitive with the established networks; and two new incipient networks.

Second, in 1977 there were over 8,000 radio stations.[2] Today there are only 1,161 commercial television stations, far less than the number of radio stations that existed in 1977.[3]

Third, the primary reason for eliminating the network radio rules was that the importance of radio networks had declined substantially. Radio networks comprised only 3% of total radio revenues in 1977 compared to 46% in 1941.[4] On this point, the FCC specifically noted that

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[1]*Report and Order, Review of Commission Rules and Regulatory Policies Concerning Network Broadcasting by Standard and FM Broadcast Stations*, 63 FCC 2d, 674, 676 (1977)

[2]*Id.* at 677.

[3]*Television and Cable Factbook*, Stations Volume No. 63 (1995) at C-1.

[4]*Radio Affiliate Rules*, 63 FCC 2d at 678.

the economic importance of radio networks was insignificant and contrasted this against the importance of the broadcast television networks, which in 1975 accounted for 41% of television revenues.[5] Also, the FCC noted that radio networks had suffered losses in seven of the last eight years prior to 1977.

From a purely economic standpoint, the significance of national television networks today bear no comparison to the insignificance of radio networks in 1977. Television networks are critically important to local television stations' overall revenues.

Table No. 1

Growth of U.S. Broadcast Television Spending[6]
(millions)

	TV Networks	TV Stations	Total
1994 Expenditures	**$11,075**	**$17,970**	**$29,045**
1989-1994 Compound Annual Growth	**3.4%**	**3.7%**	**3.6%**
1994-1999 Projected Compound Annual Growth	**4.8%**	**5.6%**	**5.3%**
1999 Projected Expenditures	**$14,000**	**$23,550**	**$37,550**

Thus, unlike the radio networks in 1977 – which accounted for only 3% of total radio industry revenues – television networks were responsible for 38% of total television station revenues in 1994 and will be responsible for approximately 37.3% of total television industry revenues in 1999. In short, local television stations still rely heavily on national television networks.

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[5] *Id.*

[6] Veronis Suhler & Associates, *Communications Industry Forecast, 1995-1999*, at 104.

Fourth, in 1977, the FCC was concerned that radio networks had lost $2.6 million.[7] This is not the case with today's television networks. As Table 1 indicated, the current broadcast television networks are doing very well and are expected to prosper. There is absolutely no evidence that the network affiliate rules are harming the major television networks.

In terms of ratings, the erosion of the network audience has not only stopped, but will expand due to an absolute growth in the number of TV households (viewers).

> Network prime-time ratings averaged 38.3 in 1994 (including ratings for the Fox network prorated by its prime time hours), the highest level since 1989. Since 1991, when network viewership dipped as a result of the Persian Gulf war, network ratings have risen by a point. The four networks' total audience of 36.1 million households, on average, in prime time in 1994 was the highest total since 1986. Moreover, there has been no appreciable erosion in the network audience in the last four years. Since 1990, ratings have essentially been flat – the 38.3 rating in 1994 is one-tenth of a point is higher that the rating in 1990. the growth in the number of TV households and the steady ratings performance have swelled the network audience. the total number of network viewing households was 1.5 million larger in 1994 than in 1988. Since advertisers are buying access to viewers, the growth in the number of viewers of the broadcast networks has contributed to the growth in advertising.[8] (emphasis supplied)

In fact, by any economic measure the broadcast television network companies are economically sound. As demonstrated in Tables 2 - 4, the networks have enjoyed tremendous economic success in the past few years in terms of revenue, operating income, and cash flow.

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[7]*Radio Network Rules*, 63 FCC 2d at 678.

[8]Veronis, Suhler & Associates, *Communications Industry Forecast, 1995-1999*, at 106.

Table No. 2

Television Network Companies
Revenue (millions)

Year	Revenue	Annual Revenue Growth	1990-1994 Compound Annual Growth
1990	$12,011.2	—	—
1991	11,837.6	-1.4	—
1992	12,509.9	5.7	—
1993	12,892.7	3.1	—
1994	14,184.7	10	4.2

Source: Veronis Suhler & Associates Communications Industry Report; Financial Performance Review 1990-1994, October 1995 at 18-19.

Table No. 3

Television Network Companies
Operating Income
(millions)

Year	Operating Income	Annual Growth of Operating Income (%)	1990-1994 Compound Annual Growth (%)
1990	$1,643.7	—	—
1991	1,140.7	-30.6	—
1992	1,267.7	11.1	—
1993	1,873.0	47.7	—
1994	2,444.2	30.5	10.5

Television Network Companies
Operating Income and Return on Assets
(Percentage)

Year	Operating Income Margins (%)	Operating Income Return on Assets (%)
1990	13.7	—
1991	9.6	7.0
1992	10.1	8.5
1993	14.5	12.2
1994	17.2	16.0

Source: Veronis Suhler & Associates Communications Industry Report; Financial Performance Review 1990-1994, October 1995 at 18-19.

Table No. 4

Television Network Companies
Operating Cash Flows
(Millions)

Year	Operating Cash Flow	Annual Growth of Operating Cash Flow (%)	1990-1994 Compound Annual Growth (%)
1990	1,953.8	—	—
1991	1,459.9	- 25.3	—
1992	1,578.3	8.1	—
1993	2,211.6	40.1	—
1994	2,770.4	25.3	9.1

Television Network Companies
Operating Cash Flow Margins and
Returns on Assets (%)

Year	Operating Cash Flow Margins (%)	Operating Cash Flow Returns on Assets (%)
1990	16.3	—
1991	12.3	9.0
1992	12.6	10.5
1993	17.2	14.4
1994	19.5	18.2

Source: Veronis Suhler & Associates Communications Industry Report; Financial Performance Review 1990-1994, October 1995 at 20-21.

Finally, the FCC noted that in 1977, radio networks did not perform the same function they did in 1941. Unlike television, radio networks were not providing a service similar to the television networks.

> The change in the nature of the service – in 1941 and the years before, most national network program service was the same kind of programming as that now constituting the bulk of network television entertainment – programs of a half-hour or longer. Today, the bulk of radio network programming is news and informational material, much of it in periodic (e.g. hourly) segments of 5 minutes or less...[9]

In short, the nature of radio programming, and the importance of nationally packaged entertainment radio programs had changed.

Obviously, the television networks still provide general audience half hour programs to their affiliates. Unlike radio, the market has not evolved to the point where national networks are providing "niched" programming services. Unlike radio stations, which primarily broadcast music or talk formats, television stations still rely heavily on the entertainment programs provided by their networks. Given the expenses associated with video program production, local stations will rely on the networks for the foreseeable future.

B. Competing video distribution systems will increase network power.

As expected, the networks continue the siren's song of how the marketplace has eroded their power. They trumpet the old tune that competition from cable, MMDS, DBS and from soon to be developed telephone company video systems has undermined their position in the marketplace. The Commission has used this analysis to relax several rules, most notably the financial interest and syndication rule and the Prime Time Access Rule. While INTV disagreed with this analysis in those proceedings, the alternative media argument is not applicable to issues involving the affiliate rules.

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[9] *Id.* at 678.

The fundamental issue raised in the financial interest and syndication proceeding was whether program producers, *i.e.*, the studios, needed government intervention to prevent networks from extracting financial interests from their program suppliers. The Commission found that the growth of alternative distribution services, most notably cable, attenuated the need for such intervention. The existence of these competitive distribution systems gave program suppliers another vehicle to bring program product to the market. The Prime Time Access Rule raised similar concerns. The FCC found that government intervention was not necessary to insure that non network program suppliers could access American viewers. Again the existence of alternative delivery mechanisms attenuated the need for this rule.

Whatever the wisdom of these prior decisions, they provide no justification for eliminating the network affiliate rules. Those proceedings involved the relationship between program suppliers and the networks in their capacity as program packages. In this proceeding, the issues concern the relationship between <u>local television stations</u> and their chief program packager – the networks.

In the instant case, the existence of alternate video distribution systems merely increases the leverage a network will have over their affiliates. While local off-air television is the most efficient mechanism for reaching the mass audience of all Americans, it is still only one vehicle in a panoply of video distribution systems. With the repeal of the financial interest and syndication rules, as well as the Prime Time Access Rule, the networks themselves will increasingly become the owners of video product. They will begin to view their affiliates as only one means of distributing this product to viewers. There is no question that the networks will use alternative distribution mechanisms to exert additional leverage over their affiliates.[10]

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[10]One of the more striking facts in reading the networks comments is that they fail to provide any analysis as to what the world will be like in a post fin-syn, post PTAR environment. Absent these considerations, the networks' economic analysis is faulty.

The Commission must also consider the true impact of competing distribution systems. All of these systems, cable, MMDS, and DBS compete against local television stations as well as the networks themselves. The networks cannot complain that these new technologies somehow have a greater competitive impact on the networks as opposed to local stations.

On the contrary, the FCC should not lose sight of the fact that these new technologies are competitive delivery systems to traditional off-air television stations. While people watch programs, not technology, the most acute competition today, and in the future, will be between which transmission system consumers use to watch their favorite programs. Ultimately, competition will be most fierce at the local level, as consumers decide which technology will be brought into the home to view video product.

The history of competition from new technologies indicates that the networks retain considerable power. In assessing the impact of new technologies and the purported decline of the networks, former CBS executive Gene Jankowski explains:

> The networks' share did in fact decline, but the rest of the story was different: the networks did not disappear, and many of the new viewing choices are having a tougher time surviving than the old ones. Let's review why this assessment turned out to be wrong.
>
> To begin with the business side, many observers misunderstood the meaning of the term share to the networks. They forgot that share have been declining since the second television stations went on the air. They did not realize that share was never the controlling fact in the business life of the networks, What advertisers buy is circulation, not share. As shown in Tables 1-1 and 1-2, in spite of all the new competition, in 1992 the networks reached almost the same size audience they had reached in 1980 and a larger audience than they had reached in the 1970s. And those audiences were still larger, by far, than those available through any other source.[11]

Concerns about the decline in audiences from competing technologies are not unique to the national broadcast networks. Because it is the affiliates that broadcast network programs,

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[11] Jankowski, Gene and David Fuchs, *Television Today and Tommorrow*, 1995 at 20-21.

any decline in the networks' shares has been equally felt by local affiliates.[12] In fact, the competitive impact of these technologies has a greater impact on local television stations than the national broadcast networks:

> Over the past decade, cable TV obviously has presented more of a commercial challenge for local stations (as well as nation broadcast organizations – though probably less so at the national level, where the three/four major TV networks alone remain able to deliver double-digit audience shares).[13]

The competitive impact of alternate technologies, such as cable, is more acutely felt by local television stations. This is true, in part, because the audience fragmentation resulting from multiple cable channels occurs throughout the programming day, not just during network hours.

From an advertising perspective, the national broadcast networks are in the market for national advertising dollars. However, no single cable network can provide a mass audience comparable to a single broadcast network. This is not the case at the local level. Local cable systems now compete directly with local television stations and are able to offer region-wide advertising over a multiplicity of channels.

Unlike local television stations, cable systems are able to package local advertising over a variety of programming channels. Local advertisers are in a position to target specific audiences in specific communities based on the target audience of a particular channel. For example, the local sporting goods store can purchase time on ESPN or the local sports channel. Alternatively, local advertisements can be placed on more generalized programming channels such as TNT, USA or CNN. Finally, the vast majority of cable operators have the flexibility to

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[12]Most commenting parties agree with this position. *See e.g.*, National Economic Research Associates, *Broadcast Television Networks and Affiliates: Economic Conditions and Relationship: 1980 and Today*, October 27, 1995 at 7-8, filed with Comments of the network Affiliated Stations Alliance, MM Docket No. 95-92, October 30, 1995. (hereafter "NERA Study); Joint Comments of Cosmos Broadcasting Corporation et al, MM Docket No. 95-92, October 30, 1995 at 4; Comments of Blade Communications Inc, MM Docket No 95-92, October 30 1995 at 5.

[13]*Telecommunications Policy Review*, Vol 11 No. 46, November 12, 1995 at 2.

offer local advertisers a package of 30 or more channels which includes several different programming services that cover a broad cross-section of the local audience.

Increases in clustered systems and cable interconnects give cable the ability to provide regional coverage. For example, the New York City interconnect, WNYI, provide a coverage from the tip of Long Island, into New Jersey, up to Northern Westchester County, New York, through several Connecticut Counties and, of course, throughout the burroughs of New York City. In effect, the New York Interconnect provides coverage equivalent to the New York DMA. Also, local advertisers have the ability to provide specific coverage to sub geographic areas of the system. The advertising effectiveness of local cable interconnects is well known. In the past year, the major interconnects and clustered MSOs have enjoyed dramatic increases in advertising revenues. A brief analysis of this growth appears in Table No. 5.

Table No. 5

Growth in Local Cable Advertising

1994 to 1995[14]

Interconnect,MSO or System	First Quarter Growth 1995 vs. 1994
Adlink	32%
Cable AdNet of N. Carolina	15%
Cox Communications	17%
Falcon Cable	18%
Chicago Interconnect	20%
Jones Intercable	25%-28%
New York Interconnect	34%
Northwest Cable Advertising	3%
Post-Newsweek Cable Inc.	16%-17%
Prime Cable	30%
Tampa Bay Interconnect	30%
Tele-Communications Inc.	20%
Time Warner Cable Cincinnati	12%-15%
Time Warner CityCable, NYC	35%

[14]*Multichannel News*, April 17, 1995 at 1.

Local cable advertising revenues have increased at double digit rates. Between 1988 and 1993, local and spot cable advertising increased at a compound annual rate of 17.5%. Estimates for the 1993-1998 period show a compound annual increase of 14.2%.[15]

In part, the strong growth in local advertising [on cable] is a consequence of the overall strength of the local marketplace. In addition, however, cable operators have put far more effort into attracting local advertising in recent years than they have in the past when they could automatically rely on double digit subscription spending growth.[16]

The acceleration of local cable spot growth can be seen in the tremendous growth by Adlink, a cable interconnect in Los Angeles. In 1988, Adlink's growth ad revenues were $837,000. Projected sales for 1995 amount to $30.8 million. In the words of an Adlink executive:

> "We've come light years in the last five or six years," said Thurston, who joined the interconnect in April 1989 as its general sales manager. "If you graph the dollars being spent on spot cable pre-1988, and being spend today, its a great story, but we think it can even be a better story.[17]

The double digit growth in local cable advertising revenue should be contrasted against the relatively flat increase that occurred in local television station local advertising revenue. Between 1988 and 1993 local advertising revenue grew at a compound annual growth rate of only 3%. Projections for the 1993-1998 period indicate that the compound annual growth rate for local advertising on local television stations will be only 6.4%, less than half the growth rate for cable television.[18]

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[15]Veronis, Suhler & Associates, *Communications Industry Forecast* at 131.

[16]*Id.* at 123.

[17]*Multichannel News Supplement*, March 27, 1995 at 7A.

[18]Id. at 94.

There should be no question that the existence of competing distribution technologies has had a greater competitive impact at the local level. Whatever the networks may claim regarding reduced audience shares and lack of power due to increased competition, that impact has been more pronounced at the local station level. In terms of shear economic leverage, competition from competing delivery systems has hurt local stations more than it has the broadcast networks.

More fundamentally, what bearing does the rise of non-broadcast competition have on the network/local affiliate relationship? CBS claims that the networks lack the power to inhibit potential competitors and that the current regulations are not necessary to allow competing program distributors to grow and prosper.[19] ABC and NBC make similar arguments.[20]

The fact that the major networks cannot prevent competition from competing video distribution systems and program suppliers says nothing about their ability to exert undue leverage over their affiliates. To the contrary, these alternative systems give networks more leverage over their affiliates than they had in the past. As new network/studio combinations, these alternative distribution technologies give the networks another outlet for their product.[21]

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[19]Comments of CBS, Inc. in MM Docket No. 95-92, October 30, 1995 at 7-8.

[20]Comments of National Broadcasting Company, Inc., MM docket No. 95-92, October 30, 1995 at 9-10; Comments of Capital cities/ABC, MM Docket No. 95-92, October 30 1995 at 12.

[21]Our initial comments observed that ABC, NBC and Fox all had ownership interests in major cable networks. Since that time new contracts with Major League Baseball have been signed. For the first time in history, the first round, post-season play off games will bypass the off air system and appear on ABC's ESPN. During the season, Fox will be placing weekday games on the fX network. The ability of a network to bypass its off-air affiliates is real and is already happening.

In the past, the networks had to rely exclusively on off-air television to distribute product. This is no longer the case today, and will be less so in the future.

The existence of multichannel competitors increased pressure on local stations to affiliate with a network. In a 500 channel universe, a national brand identity becomes essential. Without it, a local station can become lost. Recent decisions by local independent stations to affiliate with the new UPN and WB networks illustrates the point. A network affiliation will become more valuable as DBS increases its penetration and telephone company video systems come on-line.

Finally, competition from alternate video distribution systems has increased the demand for top quality programming. As a result, local stations face increased competition from new technologies in the program supply market. In this environment affiliating with a broadcast network is essential if a local television station is to retain access to top quality programming.

INTV believes that this proceeding should focus on the relationships that exist in the free local off-air television system. The question in this proceeding is not whether the networks have market power to preclude non-broadcast video competition. The only germane question before the Commission is whether the networks still retain power over local off-air television stations. Moreover, whether alternative subscription based technologies exist is essentially irrelevant to the 40% of American Households that rely solely on the free off-air television system for their news, entertainment and information.

C. Growth in the Off-air Television Industry Has Not Reduced Network Power Over Local Stations.

The major networks also note that competition from independent broadcast stations has dramatically altered the relationship between local affiliates and the networks. As noted above, whatever competitive impact these stations have had on the networks, that impact is felt more at the local level.

The growth in the number of television stations, however, does not justify elimination of the network affiliate rules. To the extent this argument is correct, more stations merely serve to increase the leverage a network will have over its affiliate. History demonstrates that markets with numerous television stations give the established networks more leverage than markets with fewer television stations. This makes perfect sense because it gives the networks the ability to play one station off against another. If an affiliate fails to clear programs or refuses to accept the networks compensation package, the network simply shifts affiliation to another station in the market.

From an affiliated station's standpoint it is still faced with the Hobson's choice. Either it accedes to network demands or runs the risk of losing its affiliation. There is no question that losing network affiliation will have a dramatic impact on a station's potential revenue. As Table 6 demonstrates, a station faces grave economic risks if it decides to abandon its affiliation and chooses non-affiliate status.

Table No. 6

Viewing Disparity
Affiliate vs. Independent

Year	Total Day Ratings	Avg. No. Homes Reached	Total Day Viewing Share
1992			
Affil.	18.6	17.1	60.5
Indep.	3.2	3.0	10.5
1993			
Affil	18.7	17.4	60.0
Indep.	3.3	3.3	10.6
1994			
Affil.	18.7	17.6	58.9
Indep.	3.5	3.3	11.1
1999*			
Affil.	18.7	18.7	53.7
Ind.	4.9	4.9	14.1

(*) projected

Source: Veronis Suhler and Associates, Communications Industry Forecast: Industry Spending Projections 1995-1999, July 1995 at 112 - 114.

Significantly, the ratings and viewing analysis presented above presumes the continued development of the new WB and UPN networks. It also measured the impact of the elimination of the Prime Time Access Rule on independent station viewing.

> The increase in program hours on the part of the UPN and WB networks should lead to a ratings improvement on independent stations. Together these two networks should become the equivalent of Fox, generating a combined rating of 6 to 7 by the latter part of the forecast period. At the same time there is a possibility that the Prime Time Access Rule (PTAR) may be modified or even eliminated, allowing network affiliated stations in the top 50 markets to show off-network syndicated programs in the access hour, the hour preceding prime time. If that occurs, the affiliate in a market with the weakest first-run access schedule can augments its lineup with popular off-network programs and improve not only its access performance but its prime-time lead in. We anticipate that this rule change will occur and have taken it into account over the latter part of the forecast period.
>
> Accordingly, although we expect the ratings gain for independent stations (including UPN and The WB affiliates) to be muted in 1998 and 1999 as a result of the expected PTAR change, the increase in program hours for the new networks will still be the dominant driver. We look for ratings for independent stations to rise to 4.9 by 1999 from 3.5 in 1994.[22]

This analysis underscores two critical points. Despite the growth in the profitability of the independent television sector, independent stations generally lag far behind affiliated stations. Choosing to become an independent station is not a viable option for most local affiliates.

Also, whatever success Independent stations have enjoyed in the past few years depends on the ability to secure the rights to top quality programs. The program supply market, however, will undergo considerable change in the near future. With the elimination of the financial interest and syndication rules, the networks themselves will control the distribution of off-network programs – a staple of the independent television Industry. Couple this fact with the elimination of the Prime Time Access rule and it will become more difficult for an Independent station to gain access to top quality programming. As noted above, affiliating with

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[22]Veronis Suhler and Associates, *Communications Industry Forecast*, at 114.

a network is perhaps the only way to off-set the ratings decline that will follow from elimination of the Prime Time Access Rule.

Finally, the above data demonstrate that it may be extremely risky for a station to forego its affiliation with an established network and choose to affiliate with the new, emerging networks. While the UPN and WB networks may reach parity with the major networks at some point in the future, that day is a long way off. From a station's perspective, these new networks are not yet substitutes for the established networks. Moreover, the success of these new networks as viable network alternatives for local stations depends on the FCC's resolution of the issues in this proceeding. Relaxing the existing network affiliate rules will give the established networks the ability to crush these new networks.

D. The Existing Affiliate Rules Are Critical for the Development of New, Emerging Networks.

Relying on the old Network Inquiry, the established networks suggest that the existing rules may hinder the development of new off-air broadcast networks. This claim is denied by reality. The Fox network, which grew with the present rules in place, demonstrates that the rules help new off-air television networks emerge.

The networks go to great lengths to point out that there are a sufficient number of alternative voices in each market which can serve as the basis to start new networks. They argue that independent stations, low power television stations and even cable, can serve as the foundation for new competitive networks.

Frankly, this is utter nonsense. One need only look at the established network's response to Fox's arrangement to gain access to VHF affiliates through its New World deal. The networks were concerned that substituting UHF stations for VHF stations would lead to a direct decline in audience. To now say that new emerging networks can become competitive by relying on cable and low power stations is simply absurd. Realistically, the new emerging networks start with a significant handicap by relying heavily on UHF facilities.

On this issue, the Comments of UPN are right on point. The new emerging off-air networks will have a difficult time securing affiliations with full service off-air stations. The data contained in the NPRM states that only 21% of all local markets, representing only 59% national coverage, have the six commercial stations needed to support the new UPN and WB networks.[23] Moreover, this analysis presumes that many of these commercial frequencies are available to affiliate with new, general audience, commercial networks. This may not be the case. Many of these frequencies broadcast religious or foreign language programs. There is no evidence to demonstrate that the owners of these stations are willing to abandon their existing audiences and change formats.

Looking solely at commercially available frequencies, UPN estimates that only 35 markets, representing 52.9% of total U.S. television households have six or more available commercial frequencies available to affiliate with one of the new, emerging networks.[24] As a result, there may not be a sufficient number of commercial television stations to form the basis for two new networks. As a result, the new networks must rely heavily on secondary affiliates. This gives the established off-air networks enormous power to lock out the competition.

The established networks have strong incentives to crush these networks in their infancy. Reducing the number of off-air television networks reduces competition for national advertising sales, thereby helping the existing network. Also, by eliminating the new networks, the

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[23]Comments of the United Paramount Network, MM docket No. 95-92, October 30, 1995 at 17. (UPN Comments)

[24]UPN Comments at 18.

established networks will continue their control over local affiliates. If these networks succeed, then they may, over the long term, become viable choices for local affiliated stations. Eliminating new networks today permits the established networks to continue their current level of control over their own affiliate base.

III. NETWORK AFFILIATE RULES SHOULD BE RETAINED.

A. The Right to Reject Rule is Essential for Local Programming Control.

Our initial comments observed that a local station's right to reject network programs is the cornerstone of the American broadcasting system. The right to reject is an essential component of a licensee's editorial discretion. This responsibility should not – indeed cannot – be contracted away. The FCC's proposed modification to the right to reject rule in which a station could not preempt network programming for financial reasons is inimicable to this concept.

Supporters of the Commission's proposal can cite no evidence that the current right to reject rule has in any way harmed over-the-air television networks. The FCC's and the network's concerns about eroding the network audience are nothing more than theoretical speculation. As noted above, the networks are doing quite well financially. Erosion of the network audience has stopped. A fourth network has emerged with the current rule in place. Absent some evidence of harm, the rule should remain in place without the proposed modification.

There is no question that the present right to reject rule encompasses preemptions based on "economic" considerations. NASA correctly observed that the catalyst for the present rule was a station's ability to reject network programs and in their place broadcast the 1939 World

Series.[25] The economic character of the substituted programming is irrelevant. The FCC's prior decisions to reject compensation plans that unduly penalized stations for preempting network programs support this position.[26]

Surprisingly, CBS provides the best justification for retaining the right to reject rule in its present form. CBS complains that its affiliates in Raleigh and Charlotte, North Carolina have preempted CBS programs in favor of Atlantic Coast Conference Basketball games. In other words, its North Carolina affiliates should be prohibited from carrying live ACC basketball games if they conflict with the network schedule. This would deprive viewers of highly popular programming that has a unique local interest.[27] It is unclear how one would distinguish this situation from the CBS radio stations that wanted to preempt network programs to broadcast the 1939 World Series. This is precisely the type of preemption that the right to reject rule was designed to protect.

CBS claims that if their affiliates don't carry the games, other stations in the market would be interested in broadcasting them. According to CBS there are five independent stations serving the Charlotte DMA and four commercial independents service the Raleigh-Durham DMA. INTV is not sure how CBS arrived at these numbers, but the *1995 Television & Cable Factbook* lists the commercial stations in each market as follows:[28]

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[25]NASA Comments at 18.

[26]*See Columbia Broadcasting System, Inc.*, 22 RR 265,270 (1961).

[27]Obviously, CBS' comments reflect the precise problem with the network schedule and the need for the right to reject. In North Carolina, ACC basketball is of intense local interest. For many, watching the "Tarheels," "Wolfpack" and "Blue Devils" play is a religious experience. Network programmers, or for that matter lawyers, living in New York simply can't understand this fact.

[28]*1995 Television & Cable Factbook*, Vol 63 Stations Volume at A-785.

Charlotte	Durham/Raleigh
WBTV-TV Channel 3 (CBS)	**WFAY-TV Channel 62 (Ind.)**
WCCB-TV Channel 18 (FOX)	**WKFT-TV Channel 40 (Ind.)**
WCNC-TV Channel 36 (NBC)	**WLFL-TV Channel 22 (FOX)**
WHKY-TV Channel 14 (Ind.)	**WRAL-TV Channel 5 (CBS)**
WJZY-TV Channel 46 (UPN)	**WRDC-TV Channel 28 (UPN)**
WSOC-TV Channel 9 (ABC)	**WRMY-TV Channel 47 (Ind)**
	WTVD-TV Channel 11 (ABC)
	WYED (WNCN)-TV Channel 17 (NBC)

Looking at CBS's example, one would have to exclude all of the stations affiliated with a network as alternative basketball stations, because under CBS's formulation of the rule all networks would be able to stop a local affiliate from preempting network programs for ACC basketball. Presumably, this would include stations affiliated with the new UPN and WB networks. In Charlotte, this leaves one station, WHKY-TV Channel 14, as the sole remaining commercial independent station. Unfortunately, while the station is located in the Charlotte DMA it is actually licensed to Hickory, N.C. According to the 1995 Factbook, the station does not even put a Grade B television signal through Charlotte, N.C., the home town of the NC State "Wolfpack."[29]

The same holds true for the remaining independent stations in Raleigh-Durham. The tower for WFAY-TV, Channel 62, is located south of Fayetteville and does not come close to providing Grade B coverage to Raleigh or Durham.[30] The same is true for WRMY-TV, Channel 47, which is located in Rocky Mount, N.C.[31] Despite CBS's assertions, only WKFT-TV in the Raleigh market would provide comparable coverage for ACC Basketball.

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[29] 1995 *Television & Cable Factbook* at A-803.

[30] *Id.* at A-792.

[31] *Id.* at A-811.